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No. 04-115

In The

Supreme Court of the United States

CARSON HARBOR VILLAGE, LTD.,

Petitioner,

v.

CITY OF CARSON, CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

The Western Manufactured Housing Communities Association has received the consent of the parties to file this brief as *Amicus Curiae* in support of the Petitioner and has filed the letters of consent with the Clerk of this Court.[1]

INTEREST OF AMICUS CURIAE

The Western Manufactured Housing Communities Association represents 1700 mobile home park operators. It is the largest such organization in California and, indeed, in the United States. The Association has a vital interest in the issues raised by this case because its members face those same issues continuously – particularly in California, where mobile home rent control ordinances are ubiquitous and the courts are inhospitable to the claims of park owners to a fair return on their investments. As shown in the Petition

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1 Amicus states that its counsel authored this brief and Amicus paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than Amicus made a monetary contribution to its preparation. (Supreme Court Rule 37.6.)

for Certiorari, the California courts provide no real remedy for park owners, making their ability to litigate their claims in federal court a necessity.

SUMMARY OF ARGUMENT

California has always marched to the beat of its own Fifth Amendment drummer. That is why its land use regulations have, for years, provided a stream of constitutional cases for this Court's decision that is out of scale, even given California's status as the most populous state in the Nation.

Twice in the space of two weeks, for example, this Court reined in the California judiciary, noting that it had been deciding just compensation cases "inconsistently with the requirements of the Fifth Amendment" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 [1987]), and that its decisions about development exactions smacked of "extortion" (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 837 [1987]) and were out of step with "every other court that has considered the question" (*Nollan*, 483 U.S. at 839).

California did not take to heart those clear messages from this Court. As shown in the Petition, it has spent the years since 1987 painstakingly evading this Court's teachings, and reestablishing its old, discredited position that landowners claiming regulatory takings of their property have no constitutional compensatory remedy.

The Ninth Circuit Court of Appeals has exacerbated the situation by closing the federal courthouse doors to aggrieved property owners who happen to own mobile home parks. Notwithstanding the total absence of a Fifth Amendment remedy in the California courts, the Ninth Circuit has banned such plaintiffs from seeking redress in federal court.

Ironically, the law the Ninth Circuit refused to enforce, 42 U.S.C. § 1983, was enacted for the specific purpose of allowing aggrieved citizens to bypass obstructionist state procedures and secure expeditious vindication of their *federal* constitutional rights. (E.g., *Felder v. Casey*, 487 U.S. 131, 138 [1988]; *Patsy v. Florida Board of Regents*, 457 U.S. 496, 503-505 [1982]. See further discussion *post*, pp. 6-10.)

It is time to call a halt. California's mobile home park owners need *some* court in which to seek vindication of their Fifth Amendment rights to compensation. California has plainly said it will not provide effective relief. That being so, the doors to the federal courthouse must be open. Certiorari should be granted to redress this constitutional lapse.

FACTUAL SUMMARY

Carson Harbor Village (CHV) owns a mobile home park, where it rents spaces to mobile home occupants. It sought permission from the City of Carson's Mobilehome Park Rental Review Board (Rent Board) to make a modest rent increase that

would allow it a fair return on its investment. The Rent Board said it would allow an increase of only *six percent of what CHV had requested.* Because such a miniscule rental adjustment meant that the rent level was not adequate to provide a fair return, CHV decided it had to sue to vindicate its Fifth Amendment right to just compensation.

CHV decided to sue in federal court for a number of reasons, including these. *First*, it believed its federal constitutional rights had been violated and that the place to seek redress was in federal court. *Second*, that belief was fortified because the cause arose in California. California courts have historically shown a hostility to the rights of property owners in general, and have largely refused to protect those rights. (See *post*, pp. 11-15.)

In the specific context of mobile home rent control, the California Supreme Court has invented a "remedial" system that not only fails to provide relief, it exacerbates the problem. (See *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 [Cal. 1997]; *Galland v. City of Clovis*, 16 P.3d 130 [2001].) Here's how it works. (1) A mobile home park owner must first seek approval of a rent increase from a body like the Rent Board. If dissatisfied, (2) the owner must appeal to the city council.[2] If still dissatisfied, (3) the

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[2] If the city council remands to the Rent Board that, of course, would revert the process back to step one to begin again, adding more administrative steps.

owner must seek a writ of administrative mandate from the superior court to review the city council's decision.[3] If such a review determines that the denial of a rent increase was confiscatory, then (4) return to the Rent Board to seek a "*Kavanau* adjustment," i.e., an increase in future rent from future tenants that is sufficient to compensate for the increase not granted in step (1), plus interest and costs. If turned down again (by the same Rent Board that made the initially inadequate adjustment – here, allowing CHV only six percent of what it sought), then (5) appeal again to the city council.[4] If still dissatisfied, then (6) seek another writ of administrative mandate from the superior court to determine whether the result (even with a "*Kavanau* adjustment") is still confiscatory.[5]

This nightmarish process, which places mobile home park owners in a pointless and virtually endless loop, caroming among administrative agencies and courts like crazed billiard balls, is no remedy. It is a thinly disguised scheme to exhaust the owners and their bank accounts and to discourage them from even trying to protect rights guaranteed by the Fifth Amendment.

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3 This could, of course, lead to two additional litigational steps in the court of appeal and the state supreme court – a process that consumes years.

4 See footnote 2.

5 See footnote 3.

Facing that prospect, which the California Supreme Court candidly conceded *eliminated* any right to just compensation for a Fifth Amendment taking (*Kavanau*, 941 P.2d at 854, 865, 867; *Galland*, 16 P.3d at 134), CHV sought relief in federal court.

And the federal courts, rather than throwing CHV a lifeline, slammed the door, leaving no remedy for the violation of its constitutional rights. Use the California courts, said the Ninth Circuit; the federal courts are not open for your business.

This Court's attention is needed. There is no state law remedy. Federal court access is essential.

ARGUMENT

I

THE NINTH CIRCUIT HAS PRECLUDED MOBILE HOME PARK OWNERS AS A CLASS FROM THE BENEFITS OF 42 U.S.C. § 1983

By demanding that property owners like Carson Harbor Village seek relief in the California courts under California law, the Ninth Circuit has effectively removed from that entire class of citizens the protection intended by 42 U.S.C. § 1983.

As the Petition aptly shows, ***there is no remedy available under California law for a Fifth Amendment taking under these circumstances***. (See *Kavanau*, 941 P.2d 851; *Galland*, 16 P.3d 130.)

Moreover, if a property owner seeks relief in California's courts, the Ninth Circuit will not permit later litigation of any federal claims, as due process claims will be subsumed within the takings claim (*Armendariz v. Penman*, 75 F.3d 1311 [9th Cir. 1994] [*en banc*]) and the state court takings decision will create collateral estoppel in federal court (*Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998]).[6]

Thus, the California courts have eliminated any ability for these property owners to recover just compensation for Fifth Amendment violations, and the federal courts in California have eliminated any federal avenue for redress. That makes a mockery of this Court's consistent application of 42 U.S.C. § 1983. The California courts' defiance of federal constitutional standards will have to await a certiorari petition from a California decision. The Ninth Circuit's closure of the federal courthouse doors can – and should – be remedied here.

A Section 1983 case is a "species of tort liability,"[7] a statutorily created "constitutional tort"[8]

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6 The Ninth Circuit conflicts in these matters with, e.g., *Santini v. Connecticut Haz. Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), *cert. pending*.

7 *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

8 *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely *federal* remedy"[9] with "broad and sweeping protection"[10] "to secure private rights against government encroachment,"[11] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"[12] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[13] While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader" than tort law,[14] and must be broadly and liberally construed to achieve its goals.[15] Its "goals" are straightforward: "to provide

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9 *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); emphasis added.

10 *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972); quoting with approval.

11 *Inyo County v. Paiute-Shoshone Indians*, 123 S.Ct. 1887, 1894 (2003).

12 *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part in *Monell*, 436 U.S. 658, to expand government liability.

13 *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

14 *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

15 *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

compensatory relief to those deprived of their *federal* rights by state actors"[16] by "interpos[ing] the *federal courts* between the States and the people, as *guardians of the people's federal rights*."[17] To effectuate those goals, Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals ***immediate*** *access to the federal courts* . . ."[18]

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are *always* a proper subject for adjudication, and that *we have not the right to decline* the exercise of that jurisdiction *simply because the rights asserted may be adjudicated in some other forum*."[19]

This theory of protecting *federal* rights in *federal* courts dates to the founding of the Republic, and makes clear why the Ninth Circuit's decision below is historically and doctrinally mistaken. As James Madison bluntly put it, ". . . a review of the

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16 *Felder v. Casey*, 487 U.S. 131, 141 (1988); emphasis added.

17 *Mitchum*, 407 U.S. at 243; emphasis added

18 *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982); emphasis added.

19 *McNeese v. Board of Education*, 373 U.S. 668, 674, fn. 6 (1963); emphasis added; quoting with approval.

constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of federal laws."[20] This Court itself has noted that one reason for Section 1983 was to provide a federal forum *without recourse to state litigation.*

> "It is abundantly clear that one reason the legislation was passed was to afford a *federal* right in *federal* court because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agency."[21]

For whatever reason, the California state courts have chosen to defy this Court's Fifth Amendment jurisprudence and strike out on their own course, one that precludes relief to victims of takings like CHV. It is unconscionable to allow the Ninth Circuit, in effect, to approve that state of affairs by relegating property owners to a system that seems designed to evade the Fifth Amendment's just compensation guarantee.

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20 Quoted in *Greenwood v. Peacock*, 384 U.S. 808, 836 (1966) (Douglas, J., dissenting). See also *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 347-348 (1816); *Bank of U.S. v. Deveaux*, 5 Cr. (9 U.S.) 87 (1809).

21 *Monroe*, 365 U.S. at 167; emphasis added.

II

CALIFORNIA'S MAVERICK FIFTH AMENDMENT JURISPRUDENCE PROVIDES NO REMEDY FOR PROPERTY OWNERS, LEAVING THE FEDERAL COURTS AS THE ONLY FORUM CAPABLE OF PROVIDING PETITIONER RELIEF

California has created its own Fifth Amendment world by painstakingly recreating the non-remedial regime this Court so highly criticized in 1987 in *First English* and *Nollan*. (See Pet., pp. 5-10.) The Ninth Circuit cannot banish mobile home park owners (along with other property owners) to that regime to protect their constitutional rights.

Commentators from around the country – even those that generally sympathize with (or even represent) government agencies – have long recognized California's hostility to the rights of property owners under the Fifth Amendment. They have called California's attitude toward property owners "more hostile . . . than any other high court in the nation."[22] They concluded that California's

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22 DiMento, *et al., Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A.L. Rev. 859, 872 (1980). The eight highly knowledgeable authors were led by the late UCLA law professor Donald G. Hagman, the leading land use legal thinker and analyst of his time.

attitude was "extreme,"[23] "onerous [and] draconian"[24] – in short, "the most restrictive state in the country with respect to land use."[25] California's courts have applied this bias "consistently."[26]

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23 Fischel, Regulatory Takings: Law, Economics, and Politics 226 (Harvard U. Press 1995), by a nationally recognized land economist at Dartmouth.

24 Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6, 7 (July 1985). The author, a professor of law at the University of Hawaii, co-wrote one of the most influential books on land use – unequivocally pro-regulation. (Bosselman, Callies, & Banta, The Taking Issue [CEQ 1973].)

25 Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 Rutgers L.J. 15, 70 (1983). The author has seen both sides, having served, at different times, as litigation counsel to the National Association of Home Builders and as Chairman of the Maryland-National Capital Park and Planning Commission (regulating land use in Montgomery County, Md.).

26 1 Williams, American Land Planning Law § 6.03 at 184 (rev. 1988, supp. 2000). Others openly gloated. See Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Municipal L. Rev. 192-193 (1975), quoted with disapproval in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, fn. 22 (1981) (Brennan, J., dissenting, but apparently expressing the substantive views of five Justices).

This Court responded to California in 1987, with its double-barreled *First English* and *Nollan* rebuke of its Fifth Amendment jurisprudence. One would have thought that would suffice.

This Court's admonitions notwithstanding, Californians' property rights remain very much a constitutional "poor relation." (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].) A poll of land use experts on both sides found "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities are accustomed to meeting little resistance from the state courts."[27] Two knowledgeable commentators concluded that, "[i]n California, the courts have elevated governmental arrogance to a fine art."[28]

One mechanism devised by the California courts in that process involves mobile home park rent adjustments (described *ante*, p. 4). That is the system to which the Ninth Circuit relegated CHV for constitutional relief. It can provide nothing of the sort. The system – as candidly conceded by its creators on the California Supreme Court – *will not*

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27 Coyle, Property Rights and the Constitution 11 (State U. of N.Y. Press 1993).

28 Babcock & Siemon, The Zoning Game Revisited 263 (Lincoln Inst. of Land Policy 1985). The late Richard Babcock was then the recognized dean of the Nation's land use bar and – significantly – a vigorous defender of expansive government regulatory control.

provide any Fifth Amendment just compensation from the government agency responsible for the violation. (*Kavanau*, 941 P.2d at 854, 865, 867; *Galland*, 16 P.3d at 134.) The most it can do is permit CHV and others in the same boat to go hat in hand to the same rent controllers and city councils that have refused to provide them adequate rental adjustments in the past and beg for reconsideration.

The California system provides *no incentive to the government to provide relief*, as there is no Fifth Amendment compensation available against the regulators. (Compare *Owen v. City of Independence*, 445 U.S. 622, 651 [1980] [monetary remedy against government is a "vital component" of constitutional vindication].) Instead, even assuming the Rent Board and the city council agree that the existing rent is not adequate, all they can do is authorize CHV to attempt to make itself whole by increasing the rent in the future to future tenants who may not be willing to pay the increased rents to make up for past losses with which they had nothing to do and for which they received no benefit.

Allowing the constitutional wrongdoer to shift liability to innocent third parties is no way to enforce a constitutional right. But the Ninth Circuit has given it its imprimatur. California's system has — as noted above — become the butt of black humor on a

national scale.[29] This may not be an appropriate vehicle in which to deal with that problem, but it is surely an appropriate vehicle to tell the federal courts that sit in California that they should no longer defer to that jurisdiction's subversion of federal constitutional rights, and should provide some effective protection of the Fifth Amendment rights of property owners.

III

AS A MATTER OF POLICY, A STATE PROCEDURE THAT REDUCES THE HOUSING SUPPLY – PARTICULARLY A KIND OF HOUSING NEEDED BY LOW INCOME FAMILIES – CANNOT BE CONDONED

It is an open secret that California's supply of housing has been shrinking in relation to the growth of its population while the cost of housing has escalated. The situation is such that the State Legislature has commented on it. (Cal. Govt. Code § 65589.5[a][2] ["California housing has become the

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[29] As Babcock and Siemon put it, "What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?" "[Why] sue a California community when it would cost a lot less and save much time if [the property owner] simply slit his throat." (Babcock & Siemon, *supra*, at 257, 293.)

most expensive in the nation"].) One of the few kinds of housing available for low income families is manufactured housing, i.e., the so-called "mobile homes" that are rarely "mobile" any more. Ending "the serious housing shortage" has been declared National policy by Congress. (42 U.S.C. § 1441.)

Ironically, as the need for housing has grown, the pressure on those who supply housing has also increased. As the dockets of both state and federal courts in California attest, ordinances like the one at issue here are proliferating. Designed to protect the interests of those who are already tenants in mobile home parks, the impact of these laws is that new parks are not being opened in sufficient numbers and park owners have less and less incentive to remain in business.

Absent efforts to control rent by municipal fiat, the market would provide additional competition — and competition would increase the housing supply while making rents tend to fall of their own accord. (See Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 Brooklyn L. Rev. 1281, 1304 [1989].)

Economists generally agree that the unfortunate effect of rent controls like the severe illustration at bench is that it reduces the housing stock. (See, most notably, The Report of the President's Commission on Housing 91 [1982]; see, for a study of the first decade of stringent California mobile home rent control laws, Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile*

Home Context: Placement Values and Vacancy Decontrol, 35 U.C.L.A.L. Rev. 399, 463 [1988].)

In a nutshell, overzealous rent control defeats its ostensible purpose. It drives landlords out of the market, it increases housing cost, and it denies housing to those most in need of it.

This case involves not only a substantial injury to CHV (which is significant and deserves redress), and a threat of ongoing injury and frustration to this Amicus and its many members, it involves significant public policy issues as well. If state and local governments use their enormous regulatory powers not to encourage the development of much needed housing, including mobile home park housing, but to frustrate such development by making investment in it economically unfeasible, the critical need for housing – particularly affordable housing for low and middle income families – will never be satisfied.

CONCLUSION

This Court's attention is sorely needed. California's courts provide no protection to the rights of those who own property. As they will not protect those rights, the responsibility is that of the federal courts. This is all the more true in the application of a federal statute that was expressly enacted and has been consistently enforced to allow citizens direct

access to federal court for the vindication of federal rights.

This is hardly an unusual request. Indeed, it was only a few years ago that this Court acknowledged the settled practice before 1987, when regulatory taking cases in California were routinely handled in federal court *because California clearly provided no remedy.* (See *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 699 [1999].) California has reconstructed that shameful scenario – casting itself in the role of latter-day diehard southern states invoking a doctrine they once called "interposition," using state law in an attempt (shot down by this Court) to deny constitutional rights to some of their citizens. The idea plays no better today; only the victims have changed.

Certiorari should be granted and the lower courts instructed to take jurisdiction of the merits of this case.

Respectfully submitted,

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